



January 31, 2003

HOUSE BILL No. 1116

DIGEST OF HB 1116 (Updated January 29, 2003 11:47 AM - DI 107)

Citations Affected: IC 29-1; IC 29-2; IC 30-4.

Synopsis: Various probate and trust matters. Specifies that a will may be executed, attested, and made self-proving by including in the will a self-proving clause signed by the testator and witnesses. Changes the publication of notice requirements for a court to presume that a person is dead. Establishes rules for interpreting trusts. (The introduced version of this bill was prepared by the probate code study commission).

Effective: July 1, 2003.

Kuzman, Foley

January 7, 2003, read first time and referred to Committee on Judiciary.
January 30, 2003, amended, reported — Do Pass.

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HB 1116—LS 6894/DI 87+



January 31, 2003

First Regular Session 113th General Assembly (2003)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2002 Regular or Special Session of the General Assembly.

HOUSE BILL No. 1116

A BILL FOR AN ACT to amend the Indiana Code concerning probate.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 29-1-5-3 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2003]: Sec. 3. (a) ~~The execution of This section~~
3 **applies to a will executed before, on, or after July 1, 2003.** A will,
4 other than a nuncupative will, ~~must~~ **may** be **attested** by the signature
5 of the testator and of at least two (2) witnesses ~~as follows: on one (1)~~
6 **of the following:**

7 **(1) A will under subsection (b).**

8 **(2) A self-proving clause under section 3.1(c) of this chapter.**

9 **(3) A self-proving clause under section 3.1(d) of this chapter.**

10 **(b) A will may be attested as follows:**

11 (1) The testator, in the presence of two (2) or more attesting
12 witnesses, shall signify to ~~them~~ **the witnesses** that the instrument
13 is the testator's will and either:

14 (A) sign the will;

15 (B) acknowledge the testator's signature already made; or

16 (C) at the testator's direction and in the testator's presence have
17 someone else sign the testator's name.

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(2) The attesting witnesses must sign in the presence of the testator and each other.

An attestation or self-proving clause is not required under this subsection for a valid will.

(b) An attested will may at the time of its execution or at any subsequent date be made self-proved by the acknowledgment of the will by the testator and the verifications of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the testator and witnesses attached or annexed to the will in form and content substantially as follows:

UNDER PENALTIES FOR PERJURY, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

- (1) that the testator executed the instrument as the testator's will;
- (2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;
- (3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;
- (4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;
- (5) that the testator was of sound mind when the will was executed; and
- (6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, eighteen (18) or more years of age or was a member of the armed forces or of the merchant marine of the United States or its allies:

Testator

Date

Witness

Witness

(c) Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:

- (1) The proper execution of a will.
 - (2) The intentions of a testator.
 - (3) The mental state or capacity of a testator.
 - (4) The authenticity of a will.
 - (5) Matters that are determined by a court to be relevant to the probate of a will.
- (d) This subsection applies to all wills, regardless of the date a will



is executed. A will is presumed to be self-proved if the will includes an attestation clause signed by the witnesses that indicates that:

(1) The testator signified that the instrument is the testator's will;
 (2) in the presence of at least two (2) witnesses; the testator signed the instrument or acknowledged the testator's signature already made or directed another to sign for the testator in the testator's presence;

(3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;

(4) each of the witnesses, in the testator's presence and in the presence of all other witnesses; is executing the instrument as a witness;

(5) the testator was of sound mind when the will was executed; and

(6) the testator is, to the best of the knowledge of each of the witnesses; either:

(A) at least eighteen (18) years of age; or

(B) a member of the armed forces or the merchant marine of the United States or its allies.

(c) A will that is executed substantially in compliance with subsection (b) will not be rendered invalid by the existence of:

(1) an attestation or self-proving clause or other language; or

(2) additional signatures;

not required by subsection (b).

(d) A will executed in accordance with subsection (b) is self-proved if the witness signatures follow an attestation or self-proving clause or other declaration indicating in substance the facts set forth in section 3.1(c) or 3.1(d) of this chapter.

(e) This section shall be construed in favor of effectuating the testator's intent to make a valid will.

SECTION 2. IC 29-1-5-3.1 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 3.1. (a) This section applies to a will executed before, on, or after July 1, 2003. When a will is executed, the will may be:

(1) attested; and

(2) made self-proving;

by incorporating into or attaching to the will a self-proving clause that meets the requirements of subsection (c) or (d). If the testator and witnesses sign a self-proving clause that meets the requirements of subsection (c) or (d) at the time the will is executed, no other signatures of the testator and witnesses are required for the will to be validly executed and self-proved.



(b) If a will is executed by the signatures of the testator and witnesses on an attestation clause under section 3(b) of this chapter, the will may be made self-proving at a later date by attaching to the will a self-proving clause signed by the testator and witnesses that meets the requirements of subsection (c) or (d).

(c) A self-proving clause must contain the acknowledgment of the will by the testator and the statements of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the testator and witnesses (which may be made under the penalties for perjury) attached or annexed to the will in form and content substantially as follows:

We, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the testator executed the instrument as the testator's will;

(2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;

(3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;

(5) that the testator was of sound mind when the will was executed; and

(6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

Testator

Date

Witness

Witness

(d) A will is attested and self-proved if the will includes or has attached a clause signed by the testator and the witnesses that indicates in substance that:

(1) the testator signified that the instrument is the testator's will;

(2) in the presence of at least two (2) witnesses, the testator



signed the instrument or acknowledged the testator's signature already made or directed another to sign for the testator in the testator's presence;

(3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;

(4) each of the witnesses, in the testator's presence and in the presence of all other witnesses, is executing the instrument as a witness;

(5) the testator was of sound mind when the will was executed; and

(6) the testator is, to the best of the knowledge of each of the witnesses, either:

(A) at least eighteen (18) years of age; or

(B) a member of the armed forces or the merchant marine of the United States or its allies.

(e) This section shall be construed in favor of effectuating the testator's intent to make a valid will.

SECTION 3. IC 29-1-5-3.2 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 3.2. Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:**

(1) The proper execution of a will.

(2) The intentions of a testator.

(3) The mental state or capacity of a testator.

(4) The authenticity of a will.

(5) Matters that are determined by a court to be relevant to the probate of a will.

SECTION 4. IC 29-1-5-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 6.** No will in writing, nor any part thereof, except as in this article provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed, subscribed and attested as required in section 3 or 3.1 of this chapter. A will can be revoked in part only by the execution of a writing as herein provided. And if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it, or, unless, after such revocation, he shall duly republish the previous will.

SECTION 5. IC 29-1-5-9 IS AMENDED TO READ AS FOLLOWS



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[EFFECTIVE JULY 1, 2003]: Sec. 9. An instrument creating an inter vivos trust in order to be valid need not be executed as a testamentary instrument pursuant to section 3 **or 3.1** of this chapter, even though such trust instrument reserves to the maker or settlor the power to revoke, or the power to alter or amend, or the power to control investments, or the power to consume the principal, or because it reserves to the maker or settlor any one or more of said powers.

SECTION 6. IC 29-2-5-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 1. (a) When any resident of Indiana is absent from the individual's usual place of residence and gone to parts unknown for a period of five (5) years, without having made any sufficient provision for the care and management of the individual's property, real or personal, and the court having probate jurisdiction in the county where the individual last resided or where the property is situated determines that:

(1) the individual's property is suffering waste for want of proper care; or

(2) the family of the individual is in need of the use and proceeds of the property for support or education (or that the sale of the property, or part thereof, is necessary for the payment of the individual's debts);

it shall be presumed and taken by the court that the individual is dead. The court has jurisdiction over the estate of the individual in the same manner and to the same extent as if the individual were dead. The court shall appoint an administrator of the individual's estate, who shall have all of the powers and rights over the estate and be subject to all of the liabilities and duties that appertain to administrators of decedents' estates.

(b) Before the court may determine that an individual should be presumed dead, notice to the individual must be published ~~for thirty (30) days~~ **once each week for three (3) consecutive weeks, with the first notice published more than thirty (30) days before the hearing** in a newspaper of general circulation in ~~(+) the county where the individual last resided or where the individual's property is located. and~~ **(2) the state capital.**

(c) The will of an individual who is presumed dead under this section is admissible to probate under IC 29-1 and shall be probated as the will of a deceased individual.

SECTION 7. IC 30-4-2.1 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]:

Chapter 2.1. Rules for Interpretation of Trusts



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1 **Sec. 1. In the absence of a contrary intent appearing in the trust,**
 2 **a trust shall be construed in accordance with the rules in this**
 3 **chapter.**

4 **Sec. 2. (a) Except as provided in subsection (b), in construing a**
 5 **trust naming as beneficiary a person described by relationship to**
 6 **the settlor or to another, a person adopted before:**

7 **(1) the person is twenty-one (21) years of age; and**

8 **(2) the death of the settlor;**

9 **shall be considered the child of the adopting parent or parents and**
 10 **not the child of the natural or previous adopting parents.**

11 **(b) If a natural parent or previous adopting parent marries the**
 12 **adopting parent before the settlor's death, the adopted person shall**
 13 **also be considered the child of the natural or previous adopting**
 14 **parent.**

15 **(c) A person adopted by the settlor after the person becomes**
 16 **twenty-one (21) years of age shall be considered the child of the**
 17 **settlor. However, no other person is entitled to establish the**
 18 **relationship to the settlor through the child.**

19 **Sec. 3. A provision in a trust that provides, or has the effect of**
 20 **providing, that a beneficiary forfeits a benefit from the trust if the**
 21 **beneficiary contests the trust is void.**

22 **Sec. 4. (a) Except as provided in subsection (b) and section 5 of**
 23 **this chapter, when a settlor fails to provide in the settlor's trust for**
 24 **a child who is:**

25 **(1) born or adopted after the making of the settlor's trust; and**

26 **(2) born before or after the settlor's death;**

27 **the child is entitled to receive a share in the trust assets. The child's**
 28 **share of the trust assets shall be determined by ascertaining what**
 29 **the child's intestate share would have been under IC 29-1-2-1 if the**
 30 **settlor had died intestate. The child is entitled to receive a share of**
 31 **the trust assets equivalent in value to the intestacy share**
 32 **determined under IC 29-1-2-1.**

33 **(b) Subsection (a) does not apply to a child of the settlor if:**

34 **(1) it appears from the trust that the settlor intentionally**
 35 **failed to provide in the settlor's trust for the child; or**

36 **(2) when the trust was executed:**

37 **(A) the settlor had at least one (1) child known to the**
 38 **settlor to be living; and**

39 **(B) the settlor devised substantially all of the settlor's**
 40 **estate to the settlor's surviving spouse.**

41 **Sec. 5. (a) Except as provided in subsection (b), if, at the time of**
 42 **the making of the trust, the settlor:**

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1 (1) believes a child of the settlor to be dead; and
 2 (2) fails to provide for the child in the settlor's trust;
 3 the child is entitled to receive a share in the trust assets. The child's
 4 share of the trust assets shall be determined by ascertaining what
 5 the child's intestate share would have been under IC 29-1-2-1 if the
 6 settlor had died intestate. The child is entitled to receive a share of
 7 the trust assets equivalent in value to the intestacy share
 8 determined under IC 29-1-2-1.

9 (b) Subsection (a) does not apply to a child of the settlor if it
 10 appears from the trust or from other evidence that the settlor
 11 would not have devised anything to the child had the settlor known
 12 that the child was alive.

13 Sec. 6. If a devise of real or personal property, not included in
 14 the residuary clause of the trust:

15 (1) is void;
 16 (2) is revoked; or
 17 (3) lapses;
 18 the devise becomes a part of the residue and passes to the residuary
 19 beneficiary.

20 Sec. 7. (a) As used in this section, "descendant" includes the
 21 following:

22 (1) A child adopted before the child is twenty-one (21) years
 23 of age by:

24 (A) the settlor; or
 25 (B) the settlor's descendants.

26 (2) A descendant of a child adopted as set forth in subdivision
 27 (1).

28 (3) A child who is born of the mother out of wedlock in either
 29 of the following circumstances:

30 (A) The mother is a descendant of the settlor.
 31 (B) The mother is the settlor.

32 (4) If the right of a child born out of wedlock to inherit from
 33 the father is or has been established in the manner provided
 34 under IC 29-1-2-7, the child, in either of the following
 35 circumstances:

36 (A) The father is a descendant of the settlor.
 37 (B) The father is the settlor.

38 (5) A descendant of a child born out of wedlock as set forth in
 39 subdivisions (3) and (4).

40 (b) If:

41 (1) an estate, real or personal, is devised to a descendant of the
 42 settlor; and

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1 **(2) the beneficiary:**
2 **(A) dies during the lifetime of the settlor before or after the**
3 **execution of the trust; and**
4 **(B) leaves a descendant who survives the settlor;**
5 **the devise does not lapse, but the property devised vests in the**
6 **surviving descendant of the beneficiary as if the beneficiary had**
7 **survived the settlor and died intestate.**
8 **Sec. 8. Kindred of the half blood are entitled to receive the same**
9 **trust interest that they would have received if they had been of the**
10 **whole blood.**

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred House Bill 1116, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 1, line 7, delete "An attestation clause" and insert "**A will**".

Page 2, between lines 2 and 3, begin a new line blocked left and insert:

"An attestation or self-proving clause is not required under this subsection for a valid will."

Page 3, between lines 17 and 18, begin a new paragraph and insert:

"(c) A will that is executed substantially in compliance with subsection (b) will not be rendered invalid by the existence of:

(1) an attestation or self-proving clause or other language; or

(2) additional signatures;

not required by subsection (b).

(d) A will executed in accordance with subsection (b) is self-proved if the witness signatures follow an attestation or self-proving clause or other declaration indicating in substance the facts set forth in section 3.1(c) or 3.1(d) of this chapter.

(e) This section shall be construed in favor of effectuating the testator's intent to make a valid will."

Page 3, line 28, delete "an attestation clause signed by" and insert "**no other signatures of**".

Page 3, line 29, delete "under section 3(b) of this chapter is not" and insert "**are**".

Page 3, line 29, delete "." and insert "**for the will to be validly executed and self-proved.**".

Page 3, line 36, delete "verifications" and insert "**statements**".

Page 3, line 38, after "witnesses" insert "**(which may be made under the penalties for perjury)**".

Page 3, line 40, delete "UNDER PENALTIES FOR PERJURY, we" and insert "**We**".

Page 4, line 25, after "indicates" insert "**in substance**".

Page 5, between lines 1 and 2, begin a new paragraph and insert:

"(e) This section shall be construed in favor of effectuating the testator's intent to make a valid will."

Page 8, delete lines 37 through 42.

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Delete pages 9 through 10.
and when so amended that said bill do pass.
(Reference is to HB 1116 as introduced.)

LAWSON L, Chair

Committee Vote: yeas 12, nays 0.

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